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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FIRST AMERICAN TITLE INSURANCE
COMPANY,

Plaintiff and Respondent,

v.

TIMOTHY E. FIELDS,

Defendant and Appellant.

D040097

(Super. Ct. No. GIE009630)

APPEAL from an order of the Superior Court of San Diego County, Lillian Lim,
Judge. Reversed and remanded with directions.

Timothy E. Fields appeals an order denying his special motion to strike a malicious prosecution complaint against him pursuant to California's anti-SLAPP (strategic lawsuit against public participation) statute (Code Civ. Proc., § 425.16). (All statutory references are to the Code of Civil Procedure unless otherwise specified.) He contends that plaintiff First American Title Insurance Company (First American) failed to present evidence that he filed

the underlying action against it with malice and without probable cause or to establish its likelihood of success on the merits of the action. We agree and reverse the order.

FACTUAL AND PROCEDURAL BACKGROUND

Fields represented Jim and Louise Cole in an action against First American for rescission, breach of contract, negligence and declaratory relief arising out of a refinancing transaction in which First American was the escrow agent. The Coles' complaint alleged that First American (1) failed to provide them with a loan settlement statement or a notice of closing until six months after the escrow closed; (2) improperly charged them for certain expenses, including a special traveling notary fee incurred for a document renotarization that was necessitated by First American's error; (3) failed to set up an impound account for tax, insurance and PMI/MIP reserves; and (4) failed to pay them \$5,600 in loan proceeds that they had agreed would be paid by the lender outside of escrow.

First American retained attorney David Boss to represent it in the Coles' action. Prior to filing a responsive pleading, Boss contacted Fields and informed him of evidence that the Coles' claims against First American were meritless. According to Fields, he requested that Boss send him the evidence on which First American relied but Boss failed to do so. In any event, it is undisputed that Fields neither received any evidence from Boss nor dismissed the claims against First American.

First American subsequently retained new counsel, who sent Fields a letter on October 8, 2001 attaching (1) the escrow instructions for the refinancing; (2) an estimated closing statement acknowledged by the Coles showing that \$49.96 would be paid to them at closing; (3) the actual closing statement for the refinancing showing \$407.34 payable to the

Coles; (4) a closing letter dated July 7, 2000 from First American to the Coles referring to an enclosed check for \$407.34; and (5) a cancelled First American check for \$407.34, endorsed by the Coles and posted to their account on August 22, 2000. Based on the evidence, the letter asserted the invalidity of the Coles' claims and indicated that, if the Coles continued to pursue their action against it, First American would ultimately sue them and their counsel for malicious prosecution.

On October 9, Fields prepared a request to enter First American's default, but the court rejected the request, apparently because First American had in the interim filed a demurrer to the Coles' first amended complaint. Fields did not file any opposition to the demurrer, which the court sustained with leave to amend. Fields then substituted out as the Coles' counsel and, within several days of his receipt of First American's October 8 letter, new counsel dismissed the claims against First American.

First American promptly filed this action for malicious prosecution against the Coles and Fields. Fields challenged the claims against him by bringing the anti-SLAPP motion to strike the complaint. The trial court denied the motion, finding that (1) in accordance with this court's decision in *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, a malicious prosecution action is properly subject to challenge by an anti-SLAPP motion; (2) although it appeared Fields was not fully apprised of the unmeritorious nature of the Coles' claims until after the underlying lawsuit was filed, First American nonetheless suffered compensable damages as a result of having to appear at the hearing on its demurrer; and (3) First American's evidence made a prima facie showing, "albeit a minimal one," of malice.

DISCUSSION

Section 425.16, subdivision (b) provides in relevant part that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Its purpose is to encourage participation in matters of public significance by allowing a court to promptly dismiss unmeritorious actions or claims that are brought to chill another's valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. (§ 425.16, subd. (a).) In furtherance of this purpose, the anti-SLAPP statute is to be construed broadly. (*Ibid.*; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1130.)

A defendant bringing an anti-SLAPP motion to strike must make a prima facie showing that the plaintiff's suit is subject to section 425.16, i.e., that the defendant's challenged acts were taken in furtherance of his constitutional rights of petition or free speech in connection with a public issue. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 820, disapproved on other grounds by *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) If the defendant makes such a showing, the burden shifts to the plaintiff to demonstrate, by admissible and competent evidence, a reasonable probability that it will prevail on the merits at trial. (§ 425.16, subd. (b)(1); *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 567- 568.) "Put another way, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the

plaintiff is credited.'" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, quoting *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.) In reviewing a SLAPP motion, a court must consider the pleadings and the evidence submitted by the parties (§ 425.16, subd. (b)(2)); however, it cannot weigh the evidence, but instead must simply determine whether the respective party's evidence is sufficient to meet its burden of proof. (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1188.) On appeal, we independently review the trial court's ruling on the motion to strike. (*Foothills Townhome Assn. v. Christiansen* (1998) 65 Cal.App.4th 688, 695, disapproved on other grounds by *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 68, fn. 5.)

The issue of whether a cause of action for malicious prosecution is subject to a special motion to strike under the anti-SLAPP statute is currently pending review in the California Supreme Court. (See *Jarrow Formulas, Inc. v. LaMarche* (2002) 97 Cal.App.4th 1, 17, rev. granted Jun. 12, 2002 (S106503).) However, the parties in this case do not challenge the trial court's finding that this action falls within the ambit of section 425.16, but instead focus on whether First American made a prima facie showing of the probability of its success on the merits as necessary to support a denial of the motion to strike. We limit our discussion accordingly.

To establish a claim for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the defendant (1) commenced or directed the commencement of the prior action, which was legally terminated in the plaintiff's favor; (2) brought the action without probable cause; and (3) initiated the action with malice. (*Crowley v. Kattleman* (1994) 8 Cal.4th 666, 767.) Fields asserts, as he did below, that First American failed to

submit any evidence establishing he acted without probable cause and with malice in bringing the underlying action. We agree.

A. Probable Cause

Generally, the determination of the probable cause element of a malicious prosecution claim involves a legal question, i.e., whether, using an objective standard and based on the facts known to the underlying plaintiff or, in this case, the underlying attorney, the institution of the underlying action was legally tenable. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 875; *Ecker v. Raging Waters Group, Inc.* (2001) 87 Cal.App.4th 1320, 1330.) The simple fact that the underlying action lacked merit is not sufficient to establish the absence of probable cause. Rather, probable cause is lacking only if any reasonable lawyer would agree the action was totally and completely devoid of merit. (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382.)

A malicious prosecution action generally will not lie where it is based on the contention that, although the action was legally tenable when filed, it became legally untenable thereafter. (*Vanzant v. DaimlerChrysler Corp.* (2002) 96 Cal.App.4th 1283, 1290; see, e.g., *Sheldon Appel Co. v. Albert & Oliker, supra*, 47 Cal.3d at pp. 874-875.) "The reason the courts have held that a malicious prosecution action cannot be grounded upon actions taken within pending litigation is that permitting such a cause of action would disrupt the ongoing lawsuit by injecting tort claims against the parties' lawyers and because the appropriate remedy for actions taken within a lawsuit lies in the invocation of the court's broad powers to control judicial proceedings. [Citation.]" (*Vanzant v. DaimlerChrysler Corp., supra*, 96 Cal.App.4th at pp. 1290-1291, quoting *Adams v. Superior Court* (1992) 2

Cal.App.4th 521, 528.) In such situations, the aggrieved party is not left without a remedy; rather, it may seek sanctions, including attorney fees, against a plaintiff or attorney who frivolously pursues a lawsuit. (§ 128.7, subds. (b)-(d).)

In accordance with the foregoing principles, the relevant period for assessing whether the underlying action was objectively tenable is the time of filing and turns on what the underlying plaintiff or underlying attorney knew at that time. (*Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 627-628.) In support of its claim that Fields lacked probable cause, First American has not submitted any evidence of what facts Fields knew about the refinancing *before* he filed the action on the Coles' behalf, but instead relies on documents in its escrow file and a declaration from its counsel that those documents contradicted the allegations of the Coles' pleadings. It argues that, before filing suit, Fields should have reviewed the relevant documentation and, if he had done so, would have known that the claims against it were not legally tenable.

The difficulty with First American's argument is that existence of probable cause (or the lack thereof) must be determined from the facts Fields actually knew, or the documents he actually had, before he filed the underlying action on the Coles' behalf. Although a total absence of evidence to support a claim would negate the existence of probable cause, First American has not made any showing that Fields lacked evidence to support the Coles' claims at the time he filed the underlying action on their behalf. If Fields possessed any evidence tending to substantiate a legally cognizable claim for relief, he would not have acted tortiously in filing the underlying action, even if he were also aware of evidence that would weigh against the Coles' claims. (*Wilson v. Parker, Covert & Chidester, supra*, 28 Cal.4th at

p. 817.) "Plaintiffs and their attorneys are not required, on penalty of tort liability, to attempt to predict how a trier of fact will weigh the competing evidence, or to abandon their claim if they think it likely the evidence will ultimately weigh against them. They have the right to bring a claim they think unlikely to succeed, so long as it is arguably meritorious." (*Id.* at p. 822.)

In opposing Field's anti-SLAPP motion, First American made no showing as to what facts Fields knew before he filed the Coles' underlying complaint. (Further, there is no indication in the record that it attempted to conduct any discovery on this issue despite the statutory authorization to do so. (§ 425.16, subd. (g).) First American thus did not meet its burden to make a prima facie showing of lack of probable cause.

B. Malice

The malice element of malicious prosecution relates to the underlying plaintiff's subjective intent in initiating the prior action. (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1156-1157.) The required malice is not limited to hostility or ill will but also exists when the proceedings are instituted primarily for an improper purpose. (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 495.) As with probable cause, the determination of malice is based on the underlying plaintiff's subjective intent at the time he filed the action.

Here, First American admits that it does not have any evidence of Fields' conduct or intent prior to the filing of the Coles' complaint, but contends that Fields' post-filing conduct (such as his refusal to dismiss the complaint after his conversation with Boss, his attempt to take its default without making a courtesy call and the tone of Fields' opening brief on appeal)

are sufficient to permit an inference that Fields acted with malice in filing the underlying action. However, although post-filing conduct may have some relevance to the malice issue, we conclude that the evidence proffered by First American is insufficient to establish a prima facie showing that Fields acted with malice in filing the underlying action.

C. Conclusion

Because First American did not meet its burden to establish a prima facie case that Fields lacked probable cause and acted with malice in bringing the underlying action against it, we reverse the trial court's order denying the special motion to strike.

DISPOSITION

The order of the trial court denying Fields' special motion to strike is reversed. The matter is remanded to the trial court with directions to enter a new order granting the motion. Fields is to recover costs on appeal.

McINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.